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BRIEF FOR RESPONDENTS IN OPPOSITION

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 211

CITIES SERVICE OIL COMPANY, *Petitioner*,

v.

WALTER N. TOBRINER, ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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STATEMENT OF QUESTION PRESENTED

Where the Court of Appeals, by an opinion and judgment, resolved issues pertaining to the statutory requirements for a license to import motor-vehicle fuel into the District of Columbia and such judgment was not challenged within the time and in the manner prescribed by 28 U.S.C.A., § 2101 (c), and now stands unmodified or otherwise disturbed, may petitioner who brought the action relitigate any of the issues resolved by the judgment?

STATUTES INVOLVED

In addition to the provisions of the Motor Fuel Tax Act, as amended, § 47-1903 (a), D. C. Code, 1961, set forth at pages 4 and 5 of petitioner's brief, the following additional provisions of such Act are involved:

Section 47-1902. *Definitions.*

* * * *

(c) The term "importer" means any person who brings into, or who produces, refines, manufactures, or compounds, in the District of Columbia motor-vehicle fuel to be used by him or to be sold * * *.

* * * *

(Apr. 23, 1924, 43 Stat. 106, ch. 131, § 2; Aug. 17, 1937, 50 Stat. 677, ch. 690, title III, § 2; May 16, 1938, 52 Stat. 358, ch. 223, § 3.)

Section 47-1904. *To render monthly report to assessor of amount of fuel sold.*

Each importer engaged in the District of Columbia in the sale or other disposition or use of motor-vehicle fuel shall render to the assessor of the District of Columbia, on or before the twenty-fifth day of each calendar month, on forms prescribed, prepared, and furnished by the said assessor, a sworn report of the total number of gallons of motor-vehicle fuel within the District of Columbia sold or otherwise disposed of by such importer * * *. Such report shall be sworn to * * * by the resident general agent, or attorney in fact, or by a chief accountant or officer in case of a foreign corporation * * *. (Apr. 23, 1924, 43 Stat. 107, ch. 131, § 4; Dec. 26, 1941, 55 Stat. 871, ch. 635, § 2).

Section 47-1905. *Invoices to be rendered by importers to all purchasers except in cases of retail sales.*

Invoices shall be rendered by importers and distributors to all purchasers from them of motor-vehicle fuel within the District of Columbia except in case of retail sales. Said invoices shall con-

tain a statement, printed thereon in a conspicuous place, that the liability to the District of Columbia for the tax herein imposed has been assumed by a licensed importer named in said statement and that the importer has paid the tax or will pay it on or before the twenty-fifth day of the calendar month next succeeding the purchase. (Apr. 23, 1924, 43 Stat. 107, ch. 131, § 5; Aug. 17, 1937, 50 Stat. 676, ch. 690, title III, § 4; Dec. 26, 1941, 55 Stat. 871, ch. 635, § 2.)

Section 47-1907. *Importer's records of transactions subject to inspection of assessor and collector.*

The records of all purchases, receipts, sales, other dispositions, and uses of motor-vehicle fuel of every importer, distributor, or dealer shall, at all times during the business hours of the day, be subject to inspection by the assessor and the collector of taxes of the District of Columbia, or by their duly authorized agents or by any other agent duly authorized by the Commissioners to make such inspection. (Apr. 23, 1924, 43 Stat. 107, ch. 131, § 7; Aug. 17, 1937, 50 Stat. 676, ch. 690, title III, § 5.)

Section 47-1911. *Violations—Penalty.*

Any person violating any provision of sections 47-1903 to 47-1906 inclusive, or section 47-1908, or refusing or obstructing inspection under section 47-1907, or falsely making any statement or report required by sections 47-1901 to 47-1916, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than $50 nor more than $500 or by imprisonment for not more than one year, or by both such fine and imprisonment. (Apr. 23, 1924, 43 Stat. 108, ch. 131, § 11; Aug. 17, 1937, 50 Stat. 676, ch. 690, title III, § 7.)

Section 47-1916. *Commissioners to make necessary regulations.*

The commissioners may make such regulations as in their judgment are necessary for the administration of this chapter and may affix thereto such fines and penalties as in their judgment are necessary to enforce such regulations (in cases in which a penalty is not otherwise provided by law). (Apr. 23, 1924, 43 Stat. 110, ch. 131, § 18.)

COUNTER-STATEMENT OF THE CASE

Involved in a protracted legal controversy between the petitioner and the respondents has been the interpretation of provisions of the Motor-Vehicle Fuel Tax Law[1] which is concerned with the business of importing into the District of Columbia motor-vehicle fuels.

For the reason, among others, that it did not have in the District of Columbia a resident general agent, petitioner, a foreign corporation, was denied a license as an importer of motor-vehicle fuels for the year commencing July 1, 1957 (Appendix 8a-11a). Petitioner thereupon complained in the United States District Court for the District of Columbia that the denial of such license was wrongful and demanded declaratory and mandatory injunctive relief (Appendix 1a-4a).

The proceedings which followed resulted in a determination by the District Court, on October 3, 1960, that petitioner, as a condition precedent to the approval of its application for a motor-vehicle fuel importer's license, was required to designate a resident general agent (Appendix 67a, 68a).

Petitioner appealed to the United States Court of Appeals for the District of Columbia Circuit and that Court, in an

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[1] 43 Stat. 107, c. 131, as amended, D. C. Code, 1961, § 47-1902, *et seq.*

opinion and judgment entered May 25, 1961,[2] vacated the judgment of the District Court and remanded the case with instructions saying:

> * * * The District Court denied relief because it thought the statute required a foreign corporation to designate a resident general agent in order to get a license.
>
> We interpret the statute somewhat differently. If the corporation does not have a representative within the District who is a "resident general agent" the statute does not require the corporation to procure and designate an agent of that description. However, considering the nature of the business of importing motor fuel, the supervision of such business intended by the Motor Fuel Tax Law, and the Article 26 regulation referred to above, the importer, to qualify for a license, is required to designate a local representative and maintain a local office or place of business within the District of Columbia. In the absence of an agent known as a "resident general agent," compliance with the licensing statute requires the designation in the application of such a representative as the regulation specifies. We think this is a reasonable construction of the statute. It avoids giving the reference to a "resident general agent" a construction which requires an agent of that precise description, while at the same time it does require a local representative of requisite authority to be designated and specified in the application for a license.
>
> *In order to afford an opportunity to permit compliance in accordance with this opinion, the judgment of the District Court is vacated and the case is remanded for further proceedings not inconsistent with this opinion.* [Emphasis supplied.] (Appendix 69a, 70a.)

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[2] *Cities Service Oil Co.* v. *McLaughlin, et al.*, 110 U. S. App. D. C. 266, 292 F. 2d 759.

A "Motion for Leave to File a Petition for Rehearing and to Recall and Stay Judgment" was, by order of the Court of Appeals entered July 18, 1961, denied (Appendix 71a).

On October 4, 1961, petitioner filed in the United States District Court for the District of Columbia a motion

> • • • for a hearing, pursuant to the judgment of remand by the United States Court of Appeals for the District of Columbia Circuit entered May 25, 1961, *to determine the necessary requirements for plaintiff to obtain a motor fuel importer's license in the District of Columbia pursuant to Section 47-1903 District of Columbia Code, 1951 Edition,* • • •. [Emphasis supplied.]. (Appendix 45a-46a.)

Filed with the motion was the form of application referred to therein (Appendix 46a-48a). Upon consideration of the motion (Appendix 54a-62a), it appeared to the District Court that petitioner had not complied with the requirements set forth in the opinion and judgment of the Court of Appeals entered May 25, 1961 (Appendix 59a, 60a). The District Court thereupon entered an order which reads, in part:

> ORDERED: That the motion of plaintiff to direct the defendants to accept plaintiff's application for license as a motor vehicle fuel importer in the District of Columbia dated August 16, 1961, and to issue a license thereon to plaintiff, or, in the alternative, for a trial be, and the same hereby is, denied and the complaint herein be, and the same hereby is, dismissed (Appendix 72a).

The United States Court of Appeals for the District of Columbia Circuit, in an opinion and judgment entered May 31, 1962, unanimously affirmed the judgment of the District Court, saying:

> Our previous opinion set forth qualifications a motor fuel importer must satisfy in order to obtain a license under the statute. Our decision [3] became the law of the case and was followed by the District Court * * * (Appendix 76a).

The Court of Appeals, on June 21, 1962, denied petitioner's application "for an injunction or for continuation of injunction [t]heretofore granted, pending certiorari." (Appendix 78a.) Petitioner thereafter applied to the Supreme Court for an order (1) staying the execution of and enforcement of the judgment entered May 31, 1962, and (2) restraining the respondents from restricting or interfering with petitioner in the importation and distribution of motor fuel in the District of Columbia pending disposition of petition for writ of certiorari. Mr. Justice Black, on July 3, 1962, denied the application.

ARGUMENT

Because no question of substance is involved the petition for writ of certiorari should be denied.

Petitioner would have the Supreme Court review on writ of certiorari the judgment of the United States Court of Appeals for the District of Columbia Circuit entered May 31, 1962, in *Cities Service Oil Co.* v. *Tobriner, et al.*, ___ U. S. App. D. C. ___, ___ F. 2d ___. The Court of Appeals said in that case:

> Our previous opinion set forth qualifications a motor-fuel importer must satisfy in order to obtain a license under the statute. Our decision became the law of the case and was followed by the District Court. * * * (Appendix 76a.)

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[3] *Cities Service Oil Co.* v. *McLaughlin, et al.*, 110 U. S. App. D. C. 266, 292 F. 2d 759.

The "previous opinion" referred to was rendered May 25, 1961, in the case of *Cities Service Oil Co.* v. *McLaughlin, et al.*, 110 U. S. App. D. C. 266, 292 F. 2d 759. The judgment in that case was on the merits and settled beyond any question that a foreign corporation applying for a license to import motor-vehicle fuels into the District of Columbia must, if it does not have a resident general agent, "* * * designate a local representative and maintain a local office or place of business within the District of Columbia * * *" (Appendix 69a, 70a).

Following the denial of its motion for leave to file a petition for rehearing and to recall and stay judgment (Appendix 71a) petitioner did not challenge further the judgment. Because the matters thus finally determined by the Court of Appeals were within the jurisdictional sphere of the case as presented, the judgment is conclusive on petitioner not only as to the disputed questions of law and fact which were resolved but also as to all such questions that were open to consideration even though not specifically raised on appeal. See in this connection *United States* v. *Munsingwear*, 340 U. S. 36, 38, 95 L. Ed. 36; *Commissioner* v. *Sunnen*, 333 U. S. 591, 597, 92 L. Ed. 898; *Werlein* v. *New Orleans*, 177 U. S. 390, 44 L. Ed. 817.

The reasons assigned by petitioner for the issuance of the writ of certiorari are in substance that (1) it was denied a trial, (2) the Court of Appeals "departed from the judicial function and entered the area of the administrative function," (3) the regulations made pursuant to the Motor Fuel Tax Act somehow transcended the "requirements of the statute," and (4) "obiter dictum as to matters previously not litigated cannot become the law of the case." These contentions, however, amount to nothing so much as an attempt to relitigate in this Court issues finally resolved by the judgment of the Court of Appeals in *Cities Service Oil Co.* v. *McLaughlin, et al., supra.*

No principle of law is more firmly established than that matters finally disposed of and determined by an appellate court cannot be relitigated. When therefore the Court of Appeals in deciding *Cities Service Oil Co.* v. *McLaughlin*, vacated the judgment of the District Court and remanded with specific instructions "* * * to afford an opportunity to permit compliance in accordance with this opinion, * * *" (Appendix 70a), the trial court was required to carry the judgment into execution in a manner consistent with the directions in the opinion. In this connection the Supreme Court said in *Ex parte Union Steamboat Company*, 178 U. S. 317, 44 L. Ed. 1084:

> The duty of an inferior court upon receiving the mandate of this court is nowhere better described than by Mr. Justice Baldwin in an early case upon that subject (*Sibbald* v. *United States*, 12 Pet. 488, 492, 9 L. ed 1167, 1169): "Whatever," said he, "was before the court, and is disposed of, is considered as finally settled. The inferior court is bound by the decree as the law of the case, and must carry it into execution according to the mandate. They cannot vary it or examine it for any other purpose than execution; or give any other or further relief; or review it upon any matter decided on appeal for error apparent; nor intermeddle with it, further than to settle so much as has been remanded. * * *"

In view of the foregoing, the conclusion is compelled that petitioner has failed utterly to assert any ground for review conceivably falling within the standards and considerations governing review on certiorari as prescribed by Rule 19 of the Rules of the Supreme Court of the United States.

CONCLUSION

Because no question of substance is involved, respondents respectfully submit that the petition for writ of certiorari should be denied.

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